

Before the
Federal Communications Commission
Washington, D.C. 20554

City of Dublin, Georgia)	
Petitioner)	
)	File No. PA 00-008
v.)	
)	
Georgia Power Company,)	
Respondent.)	

ORDER GRANTING TEMPORARY STAY

Adopted: November 16, 2001

Released: November 21, 2001

By the Deputy Chief, Cable Services Bureau:

1. On November 7, 2000, the above-captioned Petitioner filed a petition for temporary stay ("Petition") with the Federal Communications Commission ("Commission") against the above-captioned Respondent pursuant to Section 224 of the Communications Act of 1934, *as amended* ("Pole Attachment Act")¹ and Section 1.1403 (d) of the Commission's Rules.² The Petition was filed in response to notice from Respondent that it was increasing Petitioner's pole attachment rate from an annual per pole rate of \$5.83 to \$53.35. In this Order, we hold the Petition in abeyance, pending a status report by the parties concerning their negotiation in good faith of a new pole attachment rate agreement in accordance with the Commission's rules.

2. Pursuant to the Pole Attachment Act, the Commission has the authority to regulate the rates, terms, and conditions for attachments by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility. The Commission shall provide that such rates, terms and conditions are just and reasonable.³ The Pole Attachment Act grants the Commission general authority to regulate such rates, terms and conditions, except where such matters are regulated by a State.⁴ The Commission is authorized to adopt procedures necessary to hear and to resolve complaints concerning such rates, terms, and conditions.⁵ The Telecommunications Act of 1996 ("1996

¹ 47 U.S.C. § 224.

² 47 C.F.R. § 1.1403.

³ 47 U.S.C. § 224 (b) (1).

⁴ 47 U.S.C. § 224(b) and (c). Georgia has not certified that it regulates rates, terms and conditions of pole attachments. *See Public Notice, "States That Have Certified That They Regulate Pole Attachments,"* DA 92-201, 7 FCC Rcd 1498 (1992).

⁵ 47 U.S.C. § 224(b)(1). The Commission has developed a formula methodology to determine the maximum allowable pole attachment rate. *See Adoption of Rules for the Regulation of Cable Television Pole Attachments, First Report and Order*, 68 FCC 2d 1585 (1978); *Second Report and Order*, 72 FCC 2d 59 (1979); *Memorandum and Order*, 77 FCC 2d 187 (1980), *aff'd*, *Monongahela Power Co. v. FCC*, 655 F.2d 1254 (D.C. Cir. 1985) (*per curiam*); and *Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility*

Act"),⁶ expanded the scope of Section 224 by applying the pole attachment rate formula to rates for pole attachments made by telecommunications carriers⁷ in addition to cable systems,⁸ until a separate methodology⁹ became effective for telecommunications carriers after February 8, 2001.¹⁰ A utility must charge a pole attachment rate that does not exceed the maximum amount permitted by the formula developed by the Commission. We have concluded that "where onerous terms or conditions are found to exist on the basis of the evidence, a cable company may be entitled to a rate adjustment or the term or condition may be invalidated."¹¹

3. Section 1.1403 (d) of the Commission's rules provides that a cable television system operator or telecommunications carrier may file a petition for temporary stay within 15 days of receipt of a notice of a rate increase. In our First Report and Order,¹² we stated that, when a utility is about to take some action that is likely to cause irreparable harm to an attacher, we believe an attacher should have access to some form of temporary relief pending resolution by the Commission of the underlying dispute. We anticipated that such a petition would be filed only in "those exceptional circumstances where the Commission's authority to order a refund or other corrective action after a final determination on the lawfulness of a rate increase or other change would not make the [attacher] whole."¹³

4. By letter dated October 11, 2000, Respondent announced to Petitioner that it was increasing its annual per pole attachment rate to \$53.35.¹⁴ In its Petition, Petitioner states that it has attachments on poles owned by Respondent in order to provide telecommunications service to its citizens.

Poles, 2 FCC Rcd 4387 (1987). See also, *Implementation of Section 703(e) of the Telecommunications Act of 1996*, 13 FCC Rcd 6777 (1998) and *Amendment of Rules and Policies Governing Pole Attachments*, FCC 00-116, 15 FCC Rcd 6453 (2000).

⁶ Pub. L. No. 104-104, 110 Stat. 56 (1996).

⁷ 47 U.S.C. § 153(44).

⁸ 47 U.S.C. § 153(8); 47 U.S.C. § 602(5).

⁹ See *Implementation of Section 703(e) of the Telecommunications Act of 1996*, 13 FCC Rcd 6777 at ¶¶ 116-130 (1998).

¹⁰ See 47 U.S.C. § 224(d)(3) and 47 U.S.C. § 224(e)(4). See *Amendment of Rules and Policies Governing Pole Attachments*, FCC 00-116, 15 FCC Rcd 6453 at ¶ 5 (2000).

¹¹ *Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles, Memorandum Order and Opinion on Reconsideration*, 4 FCC Rcd 468 at ¶ 25 (1989).

¹² See *Adoption of Rules for the Regulation of Cable Television Pole Attachments, First Report and Order*, 68 FCC 2d 1585 at ¶ 8 (1978).

¹³ *Id.*

¹⁴ See letter dated October 11, 2000 to City of Dublin from J. Daryll Wilson, Joint Use Coordinator, Georgia Power. Petitioner states that it has not yet received legal notice from Respondent in accordance with its requirements for legal notice.

Petitioner states that previously it agreed to a fee of \$5.83 for its pole attachments. Petitioner states that it will suffer irreparable harm if relief from paying the new rate is not granted. Specifically Petitioner will be forced to pay an unreasonable fee or cease providing service. Petitioner asserts that Respondent did not follow the Commission's rules when establishing its pole attachment rate.

5. Respondent asserts a stay will violate Respondent's right to just compensation under the Fifth Amendment to the United States Constitution. Because the just and reasonable rate calculated using the pole attachment formula satisfies the constitutional requirement of just compensation,¹⁵ we find that application of the formula will not result in a taking without just compensation. Respondent also asserts that Petitioner failed to meet its burden under Section 1.1403 (d) to establish irreparable harm or cessation of service. On the other hand, Respondent makes no attempt to assert that it made any effort to negotiate the new rate or that it followed the Commission's rate formula to calculate its increase. Our rules require that the parties seek first to resolve their differences by negotiation.¹⁶ When the parties to a pole attachment agreement cannot negotiate a reasonable rate, we apply our pole attachment rate formula using public data when available.

6. We find that Respondent has not attempted to negotiate a pole attachment rate in accordance with the Pole Attachment Act and the Commission's rules and formulas. The purpose of the Pole Attachment Act, to prevent the assessment of unjust and unreasonable rents on attachers, would be frustrated if utilities' charged whatever rate they wanted without using the Commission's formula as a guide to what is just and reasonable. Petitioner has not filed a complaint pursuant to the pole attachment rules¹⁷ and neither party has provided the Commission with its current status. We recently determined the appropriate attachment rates for attachment to Respondent's poles in a separate case.¹⁸ We will hold the Petition in abeyance pending a report from each party within 60 days of the release of this Order. The parties will attempt to resolve their dispute using the information provided in *Teleport v. Georgia Power Company*.¹⁹ Both parties will provide the Commission with a status report on those negotiations and any new relevant facts and information concerning their dispute.

7. Accordingly, IT IS ORDERED, pursuant to Sections 0.321 and 1.1403 of the Commission's rules, 47 C.F.R. §§ 0.321 and 1.1403, that the Petition for Temporary Stay IS HELD IN ABEYANCE PENDING FURTHER ACTION BY THE COMMISSION.

8. IT IS FURTHER ORDERED, pursuant to Sections 0.321 and 1.1401-1.1418 of the Commission's rules, 47 C.F.R. §§ 0.321 and 1.1401-1.1418, that Respondent shall continue to GRANT ACCESS to Complainant pending the negotiation in good faith of a new agreement.

¹⁵ See *Alabama Cable Telecommunications Association, et al. v. Alabama Power Company*, File No. PA 00-003, FCC 01-181, 16 FCC Rcd 12209 at ¶¶ 32-61 (2001), *appeal pending sub nom. Alabama Power Company v. FCC*, Case No. 00-14763-I (11th Cir., filed Sept. 13, 2000).

¹⁶ 47 C.F.R. § 1.1404 (l) (1999).

¹⁷ 47 C.F.R. § 1.1401, et seq.

¹⁸ See *Teleport v. Georgia Power Company*, DA 01-XXXX (released November , 2001).

¹⁹ *Id.*

9. IT IS FURTHER ORDERED, pursuant to Sections 0.321 and 1.1401-1.1418 of the Commission's rules, 47 C.F.R. §§ 0.321 and 1.1401-1.1418, that Petitioner and Respondent SHALL NEGOTIATE IN GOOD FAITH, a new pole attachment agreement with a just and reasonable annual pole attachment rate, in accordance with the Commission's rules and *Teleport v. Georgia Power Company*.

10. IT IS FURTHER ORDERED, pursuant to Sections 0.321 and 1.1401-1.1418 of the Commission's rules, 47 C.F.R. §§ 0.321 and 1.1401-1.1418, that Petitioner and Respondent SHALL file a report with the Chief, Cable Services Bureau, within 60 days of the date this Order is released, indicating the result and/or progress of their negotiations and any new relevant facts and information concerning their dispute.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson, Deputy Chief
Cable Services Bureau